No. 95-157 (14)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

—vs—

CHRISTOPHER LEE ARMSTRONG, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF FORMER LAW ENFORCEMENT OFFICIALS & POLICE ORGANIZATIONS, ET AL. IN SUPPORT OF RESPONDENTS

DAVID COLE*
GEORGETOWN LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20009
(202) 662-9078

JULIUS LOBEL
UNIVERSITY OF PITTSBURGH
LAW SCHOOL
3900 Forbes Avenue
Pittsburgh, Pennsylvania 15260
(412) 648-1375

Attorneys for the Amicus Curiae

* *Counsel of Record*

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AMICI CURIAE

National Black Police Association

NBPA is a nationwide organization of Black police associations dedicated to the promotion of justice, fairness, and effectiveness in law enforcement. It has over 130 member associations representing more than 35,000 individual members, and has previously filed briefs in the Court on matters of significant importance to law enforcement. Cf. Tennessee v. Garner, 471 U.S. 1 (1985).

Robert Bacon

Assistant Attorney General, Office of Special Prosecutions and Appeals of the Alaska Department of Law, 1984-90

Richard P. Berman

Former Chief Deputy District Attorney, Fresno County, California

Charles R. Brewer

United States Attorney, Western District of North Carolina, 1981-1987

Wade E. Byrd

Senior Assistant District Attorney, 12th Judicial District of California

John R. Dunne

Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, 1990-93

George C. Eskin

Deputy District Attorney, Ventura County, California, 1966-68; Assistant District Attorney, Ventura County, California, 1968-71; Assistant District Attorney, Santa Barbara County, California, 1975; Chief Assistant City Attorney, Los Angeles, 1976-81

Bruce A. Green

Assistant United States Attorney, Southern District of New York, Oct. 1983 - June 1987

Peter J. Hughes
Army Judge Advocate General Corps, Government Appellate Division, Sept. 1954 - Feb. 1957; Assistant United States Attorney, Los Angeles, 1957-59.

Jay M. Johnson, Jr.
Deputy District Attorney, Ventura County, California, Jan. 1971 - Dec. 1978

Thomas L. Johnson
County Attorney for Hennepin County, Minnesota, 1971-1991

John W. Keker
President, Police Commission, 1991-92, 1996

Robert J. Lerner
United States Attorney, Milwaukee, Wisconsin, 1968-69; Former Assistant United States Attorney, Milwaukee, Wisconsin, 1964-68

Elliot L. Richardson
Attorney General of the United States, 1973

Boyd L. Richie
Assistant District Attorney, Wichita County, Texas, 1980-81; District Attorney, 90th Judicial District of Texas, 1977-80; Municipal Court Prosecutor, City of Graham, Texas, 1971-74; Permanently licensed as a Texas peace officer with advanced certification, 1980 - present.

Louis Samonsky, Jr.
Senior Deputy District Attorney, Ventura County, California, 1973-82

Whitney North Seymour, Jr.
Independent Counsel (Michael Deaver Investigation), 1986-89; United States Attorney, Southern District of New York, 1970-73; Assistant United States Attorney, Southern District of New York, 1953-56

James M. Shannon
Attorney General, Commonwealth of Massachusetts, 1987-91

Barton C. Sheela, III
Deputy District Attorney, Imperial County, California, May - Sept. 1976; Assistant United States Attorney, Southern District of California, Sept. 1976 - Nov. 1979

David Y. Stanley
Deputy District Attorney, Santa Barbara County, California, Dec. 1975 - Oct. 1978.

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No. 95-157

IN THE
SUPREME COURT OF THE UNITED STATES
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UNITED STATES OF AMERICA, *Petitioner,*

-vs-

CHRISTOPHER LEE ARMSTRONG, et al.,
Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For the Ninth Circuit

BRIEF *AMICI CURIAE* OF FORMER LAW ENFORCEMENT OFFICIALS & POLICE ORGANIZATIONS, ET AL. IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICI[1]

Amici are former prosecutors, law enforcement officials, police officers, and law enforcement organizations. Amici and their members have first-hand experience in criminal law enforcement spanning over sixty years all across

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[1]Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

the nation. More specific descriptions of amici are included as an Appendix to this brief.

Amici fully recognize the importance of prosecutorial discretion to effective law enforcement. At the same time, amici believe that the reality and appearance of fairness in the administration of the criminal law is equally critical to effective law enforcement. In particular, where the public believes that prosecutors are selectively enforcing the criminal law on racial grounds, the administration of criminal justice is seriously compromised. Amici are concerned that an unrealistically high standard for discovery on selective prosecution claims will fuel public distrust and cynicism about criminal justice, and will ultimately undermine efforts to provide effective and equal protection of the criminal law to all.

STATEMENT

Respondents are five black males, charged in 1992 with several counts of distribution and possession with intent to distribute of crack cocaine, 21 U.S.C. §841(a)(1), conspiracy to distribute crack cocaine, 21 U.S.C. §846, and using firearms in connection with drug trafficking. 21 U.S.C. §841(b). Defendants sought discovery and/or dismissal of their indictments on selective prosecution grounds. They claimed that black crack offenders were prosecuted in federal court, while non-black crack offenders were prosecuted in state court, where sentences for the same offense are much less severe.

In support of their motion, defendants initially submitted a study of every case involving crack cocaine charges that the Federal Public Defender's Office for the Central District of California had closed in 1991, 1992, and 1993. The study showed that in 1991 every case -- 24 of 24 -

- was against a black defendant. In 1992, 12 of 14 defendants were black, and two were Latino. In 1993, 12 of 15 defendants were black, and three were Latino. Thus, over a three year period, the Public Defender's Office closed cases involving 53 defendants, and not a single one was white. The United States offered no evidence in opposition to the motion.

On the strength of this unrebutted showing, the district court initially ordered limited discovery. It authorized no depositions or production requests, but simply required the government to: (1) provide a list of cases with similar charges from the prior three years, identifying the race of defendants and whether federal or state authorities investigated the case; and (2) explain the U.S. Attorney's criteria for charging.

The United States moved for reconsideration, and supported its motion with three declarations and a list of all defendants charged under 21 U.S.C. §§841 and 846 over a three-year period. The government's evidence indicated that several thousand defendants had been charged under these provisions, but the government could identify no white defendants, and only eleven non-black minority defendants. A declaration from a DEA agent claimed that blacks were disproportionately involved in the distribution of crack cocaine, but did not claim that crack distributors were exclusively black. Another declaration stated that the indictments of defendants fit the general criteria federal prosecutors use to decide whom to prosecute for crack-related offenses.

In response, defendants submitted two declarations. The first related that a halfway house intake coordinator had stated that in his experience treating crack cocaine addicts, whites and blacks dealt and used the drug in equal

proportions. Another, from a defense attorney experienced in state prosecutions, stated that many non-blacks were prosecuted for crack cocaine offenses in state court.

Considering all of this evidence, the district court denied the motion for reconsideration, explaining that without expert testimony, the court could not conclude that the prosecution of exclusively black offenders in federal court was "explained by social phenomena," as the government had argued. The government refused to comply with the discovery order, and after consultation with both parties, the court dismissed the indictments and stayed its order to permit the government to appeal.

On appeal, the en banc Ninth Circuit affirmed the district court's order. The court applied the well-established two-pronged test for selective prosecution, and required defendants to "'present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors.'" Id. at 9a (quoting United States v. Bourgeois, 964 F.2d 935, 939 (9th Cir. 1992)). It found that "[w]hen all the evidence is taken together, the defendants have established several 'specific facts, not mere allegations, which establish a colorable basis' to believe that the government has engaged in selective prosecution." Pet. App. 26a. As a result, the court held, the district court did not abuse its discretion in ordering limited discovery. Id. at 27a.

Although the government's opening brief obscures this fact, the court's decision rested on four pieces of evidence: (1) defendants' showing that over a one-year period, every crack cocaine case closed by the Federal Public Defender Office involved a black defendant; (2) the declaration relating that blacks and whites use and deal

crack cocaine in equal numbers; (3) the declaration relating that non-black crack offenders have been prosecuted in state court; (4) and the government's showing, which could not identify a single white offender among its crack cocaine cases over the prior three years. In light of this evidence, the court concluded, the district court did not abuse its discretion in ordering limited discovery.

SUMMARY OF ARGUMENT

As Justice Robert Jackson, himself a former prosecutor, once said, "The prosecutor has more control over life, liberty and reputation than any other person in America."[2] While prosecutorial discretion is a critical element of our system of criminal justice, so too is equal protection of the laws. To hold that the district court in this case abused its discretion in finding a "colorable showing" of selective prosecution and ordering limited discovery would sacrifice the principle of equal protection on the mantle of prosecutorial discretion.

Equal protection of the laws, no less than prosecutorial discretion, is a critical component of an effective system of law enforcement. The criminal law depends upon the cooperation of the community, and that cooperation turns on the community's acceptance of the law as legitimate. The criminal justice system will be viewed as legitimate only to the extent that individuals are treated equally by it. Therefore, it is critical that where significant demonstrations of racial inequity are made, the prosecution be required to disclose information sufficient to resolve whether discrimination has in fact occurred.

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[2] Robert Jackson, The Federal Prosecutor, 24 J. Am. Judicature Soc'y 18, 18 (1940).

Because prosecutors have such broad discretion in making charging decisions, and because those decisions are generally free from oversight, there is ample room for invidious discrimination. The selective prosecution defense is designed to ensure that prosecutors do not abuse their discretion in a discriminatory fashion. Yet there has not been a single reported federal case of a dismissal for race-based selective prosecution since 1886. And few selective prosecution cases even make it to the discovery threshold. This Court should not make the threshold any more difficult than it already is.

This case involves only the narrow question whether defendants who have demonstrated a stark racial disparity in prosecutorial practices are entitled to limited discovery on their claim of selective prosecution. The court of appeals held only that the government must respond to discovery; it did not hold that plaintiffs have established selective prosecution. It is quite possible that discovery will reveal that the government's actions were fully legitimate. The only question here is whether limited discovery should be authorized, or whether the defendants' showing requires no legal response whatsoever.

The United States concedes that the "colorable showing" standard applied by the court of appeals (and used by all other circuits but one) is appropriate for discovery on selective prosecution claims. It maintains, however, that the court misapplied that standard in this case by failing to require any showing that similarly situated white crack offenders had not been prosecuted.

In fact, however, the court did require a "similarly situated" showing. The United States has simply disregarded evidence of record that provides the very showing that it maintains is missing. Respondents submitted declarations

stating both that whites and blacks use and distribute crack cocaine in equal amounts, and that non-black crack offenders are prosecuted in state rather than federal court. In addition, the government's own submission further supported respondents' claim, as the government was unable to identify a single white defendant (and only 11 non-black minority defendants) over a three-year period.

The United States maintains that the court of appeals improperly presumed that blacks and whites distribute crack cocaine equally. In fact, the court of appeals simply declined to adopt the competing presumption, namely, that crack cocaine distributors are exclusively black. The court's refusal to adopt such an extreme presumption was justified, particularly in light of record evidence showing that whites and blacks distribute crack in equal numbers, and that non-black offenders are tried in state court.

The United States maintains that a higher degree of proof should be required for selective prosecution claims than for other equal protection claims, relying on McCleskey v. Kemp, 481 U.S. 279 (1987). But McCleskey, which turned on the racial composition of jury verdicts, is inapposite here. The more appropriate analogue is Batson v. Kentucky, 476 U.S. 79 (1986). That case, like this one, involved a charge of racial discrimination in the exercise of prosecutorial discretion. In Batson, this Court held that a prima facie case of discrimination could be established by a racial pattern of peremptory strikes, shifting the burden to the prosecutor to offer race-neutral explanations. Here, the court of appeals held that a racially exclusive pattern of prosecutions, together with evidence that other races commit the crimes charged but are prosecuted in state court, constituted a "colorable showing" justifying limited discovery. If a racial pattern of peremptory strikes can amount to a prima facie case, surely a racial pattern of prosecutions can

support a colorable showing justifying limited discovery.

Finally, affirming the court of appeals here will not subject prosecutors and courts to a floodgate of selective prosecution claims. The United States's suggestion to the contrary is predicated on its own disregard of the full extent of the record in this case, and not on any legal infirmity in the court of appeals' analysis. The "colorable basis" discovery threshold has governed selective prosecution cases in the majority of the circuits for many years, and very few defendants have ever satisfied that standard. There is no need to increase what has historically proven to be an almost insuperable obstacle. To do so would only undermine the cause of law enforcement, by increasing distrust and skepticism about equal protection of the criminal laws.

ARGUMENT

I. EFFECTIVE CRIMINAL LAW ENFORCEMENT REQUIRES BOTH THE REALITY AND APPEARANCE OF FAIRNESS

Petitioners' brief stresses the importance of prosecutorial discretion to the enforcement of the criminal law. Pet. Br. 16-17. But effective enforcement of the criminal law also requires that this discretion be exercised without invidious discrimination. The legitimacy of the criminal law turns on the promise that all are equal before the law.

A. Effective Criminal Law Enforcement Requires the Cooperation of the Community

Without the community's cooperation, criminal law enforcement is impossible. Police officers and prosecutors

rely on members of the community to provide information for the prevention and detection of crime. Prosecutors rely on citizens to testify as witnesses. And prosecutors and courts rely on members of the community to serve as jurors and apply the law to their peers. Where the community views the criminal law as just, cooperation can be assumed. But where the law is viewed as unjust, enforcement is compromised. Police find it more difficult to get leads, prosecutors find potential witnesses more reluctant to testify, and jurors may engage in nullification.

The community's acceptance of the criminal justice system's fairness is also important at a deeper level. The vast majority of our citizens obey the criminal law. They do so, however, not because they fear imprisonment, but because their personal and peer group values are consonant with the criminal law. The likelihood of being apprehended and punished for most crimes is very small. For example, the odds of going to prison for assault, burglary, larceny, or motor-vehicle theft are one-hundred-to-one.[3] "Victimless" crimes like drug possession and distribution are even more unlikely to lead to incarceration. As a result, social scientists have determined that the deterrent effects of incarceration are not likely to play a significant role in a citizen's decision to obey or to violate the law.[4]

The most significant determinant in whether an individual obeys the law is the extent to which the individual and his or her peer group internalize the mores reflected in the criminal law. Social psychologist Tom Tyler has found

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[3] Paul H. Robinson, Fundamentals of Criminal Law 18-19 (2d ed. 1995).

[4] See Paul H. Robinson, Moral Credibility and Crime, Atlantic Monthly, March 1993, at 72, 74.

that personal morality and belief in the legitimacy of the criminal justice system are the most important contributors to compliance with the law.[5] Sociologists Robert Meier and Weldon Johnson found that the fear of disapproval by one's peer group is more important than formal legal sanctions in explaining why people obey the law.[6] And Harold Grasmick and Donald Green concluded in a 1980 study that the threat of legal sanctions, social disapproval of one's peer group, and personal morality each make significant, independent contributions to the decision to avoid criminal behavior.[7]

Where the criminal law is viewed as fair, it is more likely to reinforce personal morality, and violations of the law are more likely to bring social disapproval. Where, by contrast, the criminal law is viewed as unfair, personal and peer group values are more likely to diverge from the criminal law. As the Second Circuit has noted, "[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations such as race ... as the basis for determining its applicability." United States v. Berrios, 501 F.2d 1207, 1209 (2d Cir. 1974); see also Tyler, Why People Obey the Law, supra at 161-63.

For both of these reasons -- the importance of community cooperation and the role played by personal and

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[5] Tom Tyler, Why People Obey the Law 161-78 (1990).

[6] Robert Meier and Weldon Johnson, Deterrence as social control: The legal and extralegal production of conformity, 42 Am. Socio. Rev. 292 (1977).

[7] Harold G. Grasmick & Donald E. Green, Legal punishment, social disapproval and internalization as inhibitors of illegal behavior, 71 J. Crim. L. & Criminol. 325 (1980).

peer group values -- effective law enforcement demands first and foremost that the criminal justice system apply equally to all. "To perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136 (1955).

B. The Perception of Race Discrimination in the Administration of Criminal Law Undermines the Effectiveness of Criminal Law Enforcement

The reality and perception of race discrimination in criminal law are a significant obstacle to its enforcement. The criminal justice system has historically been plagued by discriminatory practices, and contemporary news accounts regularly carry accounts of modern-day discrimination. As a result, polls consistently show that black citizens have far less faith than whites in the criminal justice system. And this fact in turn makes it more difficult to provide the black community with equal protection of the laws.

Race discrimination has a long and unfortunate history in the American administration of criminal justice. In 1880, this Court announced that racial discrimination in selecting jury venires violated the Equal Protection Clause, Strauder v. West Virginia, 100 U.S. 303 (1880), yet until 1935, the Court regularly affirmed convictions of black defendants by all-white juries in districts and counties where few or no blacks had ever served on a criminal jury.[8] Until 1986, prosecutors were free to use peremptory strikes to

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[8] Benno C. Schmidt, Jr. Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia, 61 Tex. L. Rev. 1401 (1983).

exclude black jurors simply because they were black,[9] and through that mechanism black jurors were regularly barred from serving on petit juries.[10]

The criminal justice system is plagued by widespread racial disparities. While African-Americans make up 12 percent of the population, they fill about half of our nation's prison and jail cells. In 1995, one in three young black men between the ages of 20 and 29 was imprisoned or on parole or probation.[11] The per capita incarceration rate among blacks is seven times that among whites.[12]

The disparities are most severe in the area of drug law enforcement, the subject matter of this case. In 1992 and 1993, African-Americans constituted 13 percent of drug users, 35 percent of those arrested for drugs, 55 percent of drug convictions, and 74 percent of those serving sentences

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[9] See Swain v. Alabama, 380 U.S. 202 (1965).

[10] In Dallas County, Texas, for example, prosecutors in 100 criminal trials in 1983 and 1984 used 405 of 467 eligible black jurors, and struck five times as many black as white jurors. Steve McGonigle & Ted Timms, Prosecutors Routinely Bar Blacks, Study Finds, Dallas Morning News, Mar. 9, 1986, at A1. Over a seven-year period, one Georgia prosecutor used 94 percent of his peremptory strikes against black jurors where the defendant was black and the victim white. Horton v. Zant, 941 F.2d 1449, 1458 (11th Cir. 1991).

[11] Marc Mauer and Tracy Huling, The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later, Oct. 1995, at 1.

[12] Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 4 (1995).

for drugs.[13] From 1986 to 1990, the percentage of black defendants convicted in federal court for drug trafficking more than doubled, from 19 percent in 1986 to 46 percent in 1990.[14] By contrast, the percentage of white defendants convicted in federal court for drug trafficking increased only by about one-third, from 26 percent in 1986 to 35 percent in 1990.[15]

Between 1986 and 1991, arrests of minorities increased twice as much as arrests of whites.[16] Yet when that overall figure is broken down by type of crime, drug offenses were the only area in which minority arrests increased more than nonminority arrests. The five-year increase in minority drug arrests was almost ten times the increase in arrests of white drug offenders.[17]

Figures like these have led many to question the fairness of the criminal justice system.[18] Polls routinely demonstrate that blacks distrust the criminal justice system in far higher proportions than whites. A 1993 Gallup poll found that 74 percent of blacks believe that blacks are

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[13] Mauer and Huling, Young Black Americans and the Criminal Justice System: Five Years Later, supra at 12.

[14] Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics -- 1992, at 623 tbl 6.70 (Kathleen Maguire et al. eds. 1993).

[15] Id.

[16] American Bar Association's Section of Criminal Justice, The State of Criminal Justice: An Annual Report 9 (1993).

[17] Id.

[18] See, e.g., Tonry, Malign Neglect, supra at 49-80, 104-115.

treated more harshly than whites by the criminal justice system.[19] A National Law Journal study of 800 jurors found that where a police officer's and a criminal defendant's statements conflict, 42 percent of whites but only 25 percent of blacks believe the police officer's version should be credited.[20] Most recently, the starkly different responses of most black and white citizens to the acquittal in California v. O.J. Simpson brought home the depth of the division in black and white perceptions of crime and criminal justice.[21] As this Court has acknowledged, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555 (1979). Yet the vast majority of black citizens believe that the criminal justice system is discriminatory. And the black community's distrust and

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[19] George Gallup, Jr., The Gallup Poll Monthly, No. 339 (Dec. 1994), reported in Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics -- 1993, at 171 (1993); see also Ruth Marcus, Racial Bias Widely Seen in Criminal Justice System, Research Often Supports Black Perceptions, Wash. Post, May 12, 1992, at A4 (reporting that 89% of blacks and 43% of whites think blacks do not receive equal treatment in the criminal justice system); Black and White: A Newsweek Poll, Newsweek, Mar. 7, 1988, at 23 (reporting that 66% of blacks believe the criminal justice system treats black defendants more harshly than white defendants); Jon M. Van Dyke, Jury Selection Procedure: Our Uncertain Commitment to Representative Panels 32 (1977) ("Discrimination bred by prejudice has contributed to a widespread mistrust by black people of most oft he institutions of power, and most particularly the agencies of law enforcement").

[20] Racial Divide Affects Black, White Panelists, Nat'l L.J., Feb. 22, 1993, at 58-59.

[21] Bill Minutaglio, Simpson Case Shows Races' Differing Views on Justice: Experience has Taught Blacks to Mistrust the System, Dallas Morn. News, Aug. 6, 1994, at 1A.

suspicion "is one of the most corrosive and consequential features of crime in this society."[22]

C. Prosecutorial Discretion Feeds the Perception of Discrimination

The mistrust of the black community is fueled at least in part by unexplained discretionary decisions. Where there is room for discretion, there is room for discrimination, because "'the power to be lenient [also] is the power to discriminate.'" McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (quoting K. Davis, Discretionary Justice 170 (1973)). Prosecutorial discretion is a critically important element of the administration of criminal law, but it poses two dangers: (1) if unchecked, it may be used for discriminatory purposes; and (2) if unexplained in the face of racial disparities, it will contribute to the perception of unfairness in the criminal justice system.

As Thurman Arnold noted many years ago, "[t]he idea that a prosecuting attorney should be permitted to use his discretion ... [will appear] to the ordinary citizen to border on anarchy." [23] Similarly, Justice Harlan noted that the existence of unchecked prosecutorial discretion undermines "the appearance of evenhanded justice." Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). Justice Jackson pointed specifically to the danger that prosecutorial discretion may be used discriminatorily:

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[22] John Hagan & Ruth D. Peterson, "Criminal Inequality in America," in Hagan & Peterson, eds., Crime and Inequality 15, 17 (1995).

[23] Thurman Arnold, Law Enforcement: An Attempt at Social Dissection, 42 Yale L.J. 1, 7 (1932).

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous ... It is in this realm -- in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecution power lies.[24]

All of these concerns are presented where, as here, a claim of racially selective prosecution has been supported by evidence of a stark racial disparity. To allow such evidence to go unanswered, as petitioner asks, would add to the appearance of racial discrimination in criminal justice, and in drug enforcement in particular. That perception would in turn contribute to the black community's distrust of criminal justice, and undermine the effectiveness of law enforcement.

II. THE "COLORABLE SHOWING" STANDARD ADEQUATELY SAFEGUARDS PROSECUTORIAL DISCRETION

The mere perception of racial discrimination, of course, cannot support discovery in a criminal case. Nor is a mere statistical disparity generally enough, unless it is especially extreme. On the other hand, defendants should not be required to prove their case in full in order to obtain discovery. A balance must be struck. Amici believe that the Ninth Circuit, like the majority of Circuits, struck the proper balance by allowing limited discovery upon a "colorable

[24] Robert Jackson, The Federal Prosecutor, 24 J. Am. Judicature Soc'y 18, 18 (1940).

showing" of selective prosecution.

Amici fully appreciate the importance of prosecutorial discretion. Without it, criminal justice administration would be impossible. Limited resources mean that all law violators cannot be prosecuted. The need to encourage participation in the investigation and prosecution of crime often requires prosecutors to exercise their discretion to be lenient in exchange for assistance from a defendant. And plea bargaining, without which the criminal justice system would soon be overwhelmed, requires prosecutorial discretion.

Moreover, there are good reasons for insulating ordinary prosecutorial decisoins from judicial review. Prosecutorial discretion in the enforcement of the criminal law is a core executive function. Heckler v. Chaney, 470 U.S. 821, 832 (1985). The decision to prosecute "is particularly ill suited to judicial review." Wayte v. United States, 470 U.S. 598, 607 (1985). If prosecutor's decisions to charge were routinely subject to judicial review, defendants might be tempted to use that opportunity for delay. United States v. Falk, 479 F.2d 616, 637-38 (7th Cir. 1973) (en banc) (Pell, J., dissenting). And frequent judicial review of charging decisions might undermine deterrence by revealing the government's enforcement policies. Wayte, 470 U.S. at 607.[25] As a result, in the vast majority of cases there is no judicial review of the prosecutor's decision to charge. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

But like any discretion, prosecutorial discretion is subject to abuse. And without judicial review, this power

[25] See also James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1549-50 (1981).

may be used to violate fundamental constitutional rights. "Few officials can so affect the lives of others as can prosecutors."[26] Accordingly, the Court has adjudicated challenges to prosecutorial decisions where constitutional rights are at stake, including selective prosecution, Wayte v. United States, 470 U.S. 598, the disclosure of exculpatory information, Brady v. Maryland, 373 U.S. 83 (1963), and the use of peremptory challenges. Batson v. Kentucky, 476 U.S. 79. Indeed, one of the Court's earliest equal protection decisions involved a successful claim of selective prosecution. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

There is no dispute in this case that the courts ought to review prosecutorial decisionmaking where there is evidence of selective enforcement. Nor is there any dispute about the appropriate showing required to authorize discovery into prosecutorial practices and intent: the United States agrees with the Ninth Circuit and every other Circuit but one that discovery should be permitted where defendants have made a "colorable showing" of impermissible discrimination. Pet. Br. 22-23 (citing with approval United States v. Cooks, 52 F.3d 101 (5th Cir. 1995), and Attorney General v. Irish People, 684 F.2d 928 (1982), cert. denied, 419 U.S. 1172 (1983), both of which applied a "colorable showing" standard).[27]

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[26] Steven A. Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U.Pa. L.Rev. 1365, 1365 (1987).

[27] Every circuit but the Eighth has applied a colorable basis showing or lower at the discovery threshold. See, e.g., United States v. Penagarciano-Soler, 911 F.2d 833, 838 (1st Cir. 1990) (defendant must allege sufficient facts tending to show disparate treatment and raising a reasonable doubt about intent); United States v. Fares, 978 F.2d 52, 59 (2d Cir. 1992) (some evidence tending to show both elements); United States v. Torquato, 602 F.2d 564, 570 (3d Cir.)

While a single Circuit has held -- apparently inadvertently -- that a "prima facie" case must be established before discovery is permitted, this standard would create an unreasonably high barrier to discrimination claims.[28] A prima facie case shifts the burden to the prosecution to rebut the evidence of discrimination, and indeed is sufficient to dismiss the case unless the prosecution successfully rebuts it. To impose such a standard at the discovery threshold would effectively require defendants to prove their cases without discovery. And because the evidence necessary to establish selective prosecution -- prosecutorial practice and prosecutorial intent -- will virtually always be in the prosecution's control, such a standard would effectively preclude selective prosecution defenses in all cases other than open admissions of impermissible motive by the

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(colorable showing), cert. denied, 444 U.S. 941 (1979); United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986) (nonfrivolous showing); United States v. Peete, 919 F.2d 1168, 1176 (6th Cir. 1990) (colorable showing); United States v. Goulding, 26 F.3d 656, 662 (7th Cir.) (colorable basis), cert. denied, 115 S. Ct. 673 (1994); United States v. P.H.E., Inc., 965 F.2d 848, 860 (10th Cir. 1992) (colorable showing); Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993) (facts sufficient to raise a reasonable doubt about the prosecutor's motives), cert. denied, 114 S. Ct. 727 (1994).

[28] Only the Eighth Circuit requires defendants to prove a prima facie case to obtain discovery, and that appears to be the result of a mistaken application of its own precedent. In United States v. Parham, 16 F.3d 844, 846 (8th Cir. 1993), the court sets forth the prima facie standard, but in doing so merely cites to United States v. Hintzman, 806 F.2d 840, 846 (8th Cir. 1986). Hintzman, however, in turn merely cites United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978), which states that only a "colorable basis" is required for discovery. See also United States v. Jacob, 781 F.2d 643, 646 (8th Cir. 1986) (applying "colorable basis" standard); United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976) (applying colorable basis standard).

prosecutor.

The "colorable showing" standard has not proven burdensome to prosecutors. If anything, it has proven burdensome to defendants. No race-based discrimination selective prosecution claim has succeeded in a reported federal case since 1886. Yick Wo v. Hopkins, 118 U.S. 356. Among reported federal cases, only a handful of cases over more than a century have ever made it to the discovery threshold.[29] Even among state decisions, amici were able to locate only a single case in which a race-based selective prosecution claim resulted in dismissal.[30]

This paucity of successful race-based selective prosecution claims, when compared with the record of race discrimination in virtually every other public and private institution, (from employment to education to housing to juries), indicates that the standards currently in place are if anything too stringent. There is certainly no evidence that prosecutors -- along among all official actors -- are immune from racial prejudice.[31] Amici therefore urge the Court not

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[29] See, e.g., American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995); United States v. Adams, 870 F.2d 1140 (6th Cir. 1989); United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), vacated in part on rehearing on other grounds, 836 F.2d 1312 (11th Cir.), cert. dismissed, 487 U.S. 1265 (1988).

[30] People v. Ochoa, 165 Cal. App. 3d 885, 212 Cal. Rptr. 4 (1985). This was the only successful dismissal found in a LEXIS search of all state cases using the key words "selective prosecution" and "race."

[31] Several studies have concluded that racial considerations have affected prosecutorial charging decisions. Of most relevance here, Richard Berk & Alec Campbell studied all arrests for cocaine base in Los Angeles County between January 1, 1990 and October 10, 1992, and found that while blacks made up 58% of those arrested, the U.S. Attorney did not prosecute a single white offender during that period). Richard Berk & Alec Campbell, Preliminary Data on Race and Crack Charging Practices in Los Angeles, 6 Fed. Sent. R. 36 (1993); see also Developments in the Law -- Race and The Criminal Process, 101 Harv. L. Rev. 1520, 1525-1530 (1988) (summarizing studies); Cassia Spohn, John Gruhl & Susan Welch, The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges, 25 Criminology 175 (1987) (finding that in similarly situated cases, prosecutors rejected felony charges against whites 59% of the time, but rejected felony charges against blacks only 40% of the time); Michael Radelet & Glenn L. Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Soc'y Rev. 587 (1985) (examining over 1000 homicide cases in Florida, and finding that victim's and defendant's race had significant, independent impacts on prosecutor's initial assessment regarding severity of offense).

to depart from the "colorable showing" standard.

III. THE COURT OF APPEALS CORRECTLY APPLIED THE "COLORABLE SHOWING" STANDARD IN THIS CASE

The United States's principal contention is that the court of appeals incorrectly applied the "colorable showing" test by failing to require defendants to demonstrate that similarly situated non-black crack offenders had not been prosecuted in federal court. Pet. Br. 11. It maintains that in excusing this requirement, the court of appeals adopted an impermissible presumption that people of all races commit all types of crimes. Pet. Br. 28. Finally, it argues that claims of selective prosecution should be subjected to higher standards of proof than other equal protection claims. None of these arguments withstands scrutiny.

A. The District Court Had Sufficient Evidence Before it That Similarly Situated Non-Black Crack Cocaine Offenders Were Not Prosecuted in Federal Court

The United States's principal contention -- that the court of appeals erred by excusing any showing that similarly situtated others were not prosecuted -- is wrong both as a factual and legal matter.

1. The United States Ignores the Full Record Before the District Court

As a factual matter, the United States's objection that the evidence did not meet the "colorable showing" threshold fails to grapple with the full record before the courts below. The United States focuses almost exclusively on the study showing that 24 of 24 closed cases in 1991 involved black defendants. But that was not the only evidence considered by the district court or the court of appeals. In addition to that evidence, the courts had before them a declaration from an attorney experienced in the state criminal justice system specifically stating that in his experience non-black crack offenders were prosecuted in state court, and another declaration recounting a halfway house intake coordinator's statement that in his experience treating crack cocaine addicts, whites and blacks use and distribute crack in equal numbers. These declarations provide exactly the information the United States complains was missing. Yet apart from two footnote references, the United States's brief virtually ignores these declarations.

The United States gives three reasons for disregarding this evidence, none of them persuasive. First, it states that the district court did not rely on the declarations. Pet. Br. 28. But the language the government

quotes gives no indication that the district court declined to consider this evidence, which was submitted in connection with adjudicating the United States's motion to reconsider. Moreover, the court of appeals expressly based its decision on all the evidence before the district court, not merely the statistical study. Pet. 26a (upholding district court decision "when all of the evidence is taken together"); Pet. App. 30a (Wallace, J., concurring) (specifically relying on declarations).

Second, the United States claims that the declarations should be dismissed as "vague, conclusory, and impressionistic hearsay." Pet. Br. 35 n.4. But as the court of appeals noted, the United States never objected to the declarations' admission below, and therefore may not raise such evidentiary objections now. Pet. App. 23a n.8. Particularly when considered together with the rest of the evidence, the declarations provide far more than vague or conclusory evidence. They paint a cohesive and disturbing picture, in which a world of white and black crack cocaine users and distributors yielded an exclusively black group of federal defendants, while non-black defendants were prosecuted in state court.[32]

Third, the United States argues that the declarations

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[32] United States Dep't of Labor v. Triplett, 494 U.S. 715, 724 (1990), relied upon by the United States, Pet. Br. 35 n.4, could not be more different. In that case, the declarations at issue claimed generally that black lung attorneys' fees compensation was so inadequate that lawyers would not do the work, The declarations were wholly impressionistic, were supported by no other evidence, and were directly contradicted by a statistical study showing that 92 percent of black lung claimants were in fact represented. Here, by contrast, all of the evidence submitted points in precisely the same direction -- toward a colorable showing of discrimination.

do not establish that non-black crack offenders were precisely similarly situated to defendants here, because there was no allegation that they had conspired to distribute more than 50 grams of cocaine or that the conspiracy involved firearms. Pet. Br. 35-36 n.4. But defendants in this case were also charged with routine distribution and possession with intent to distribute cocaine. With respect to those charges, the declarations do support a showing that similarly situated others were not prosecuted in federal court. And the United States put forward no evidence to support the notion that it prosecuted only defendants who distributed over 50 grams and used firearms, or that only black offenders distribute in such quantities or use firearms.

Thus, what the United States presents as a categorical claim about the necessity for a showing that similarly situated others were not prosecuted is in fact only a disagreement about the strength of the evidence defendants put forward. On that question, the district court has considerable discretion at the discovery threshold, and did not abuse that discretion here. See Pet. App. 28a-31a (Wallace, C.J., concurring).

2. The United States Concedes That Defendants Need Not Always Show That Similarly Situated Others Were Not Prosecuted to Obtain Discovery

The United States's argument that a defendant must always show that similarly situated others were not prosecuted in order to obtain discovery is also wrong as a legal matter. Indeed, the United States concedes that such a showing would not be required "in cases involving direct admissions by officials of discriminatory purpose." Pet. Br. 15.

Similarly, were a defendant to show that 200 of 200 (rather than 24 of 24) crack cocaine cases closed by the Federal Public Defender over a one-year period involved black defendants, a court would undoubtedly be justified in finding a "colorable showing" of selective prosecution. Like an admission of discriminatory purpose, such a showing would in itself make it reasonably likely that discrimination was occurring, even without identification of specific similarly situated non-black offenders who had not been prosecuted. If a sufficiently strong racial disparity can be sufficient to establish an equal protection violation, see, Gomillion v. Lightfoot, 364 U.S. 339 (1960), it certainly ought to be enough to constitute the colorable showing required for limited discovery.

Thus, properly understood, the United States's objection to the court of appeals' decision is not a categorical one that a similarly-situated showing must always be made, but simply a dispute about whether the specific quantum of evidence justified discovery here. As Judge Wallace emphasized, the question is whether the quantum of evidence here justifies the conclusion that the district court did not abuse its discretion in ordering discovery. When the proper standard is applied to the full record, the Ninth Circuit's decision is fully justified.

B. The Court of Appeals Did Not Rely on a Presumption that Blacks and Whites Distribute Crack Cocaine Equally, But Declined to Adopt a Presumption that Blacks Exclusively Distribute Crack Cocaine

The United States claims that the court of appeals dispensed with the requirement that defendants show selection by presuming that whites and blacks commit crack cocaine offenses on an equal basis. Pet. Br. 28-30. As

shown above, the court of appeals did not in fact dispense with the selection requirement, but rested its decision on evidence that whites and blacks both use and distribute crack, and that similarly situtated non-black offenders were tried in state court.

Moreover, in assessing the significance of the statistical study, the court of appeals did not presume that whites and blacks commit crack offenses equally. Rather, it refused to adopt the opposite presumption -- that only blacks commit crack offenses. Pet. App. 19a (declining to adopt "the premise that any type of crime is the exclusive province of any particular racial or ethnic group"). In order to dismiss the persuasiveness of respondents' showing that every crack case closed by the Federal Public Defender over a one-year period involved black defendants, one must presume that blacks exclusively use and distribute crack cocaine. The court of appeals reasonably refused to adopt that presumption.

The court's refusal to adopt the only presumption that would adequately explain defendants' showing was fully supported by the record. The halfway house intake coordinator's statement supported the conclusion that whites and blacks do in fact use and distribute crack cocaine in roughly equal numbers. Pet. App. 6a. And as the court of appeals noted, "the government's own showing in and of itself provides evidence that similarly situated potential defendants of other races do exist -- in other words, that non-blacks also commit violations of 21 U.S.C. §§841 and 846." Pet. App. 19a. This evidence fully supports the court of appeals' refusal to presume that crack cocaine is exclusively distributed by blacks. And absent that presumption, defendants' evidence constitutes a colorable showing of selective prosecution.

C. Batson v. Kentucky, Not McCleskey v. Kemp, Provides Guidance For Reviewing Race-Based Exercises of Prosecutorial Discretion

The United States cites McCleskey v. Kemp, 481 U.S. 279 (1987), as support for the proposition that a claim of selective prosecution requires "exceptionally clear proof." Pet. Br. 18. But McCleskey was not a selective prosecution case, and this Court has never held that selective prosecution claims require any stronger showing of discrimination than ordinary equal protection claims. See Wayte v. United States, 470 U.S. at 608 (selective prosecution cases governed by ordinary equal protection standards); Wade v. United States, 504 U.S. 181, 185 (1992) (applying ordinary equal protection standards to claim that prosecutor exercised discretion to file a substantial-assistance motion for constitutionally impermissible motive). Indeed, amici are aware of no challenge to an exercise of prosecutorial discretion in which the Court has required "exceptionally clear proof."

McCleskey involved a challenge to Georgia's administration of the death penalty, based on a statistical study of death penalty convictions. In declining to infer intentional discrimination from that study, the Court emphasized that each conviction was reached by a unique 12-person jury of citizens. 481 U.S. at 294-95. The fact that each jury was different meant that one could not infer anything about a particular jury's motives from the past practices of other juries. Moreover, jury members could not be called on to testify about their motives, leaving the state no real opportunity to disprove an inference, were one drawn. Id. at 296.

Here, respondents' claim of discrimination is directed at the U.S. Attorney's office. No claim is made that juries

have participated in the discrimination; the contention is that the prosecutors themselves have selectively targeted black defendants for federal prosecution. Unlike jurors, prosecutors in the Central District are required to act pursuant to office policies, and a single U.S. Attorney is responsible for overseeing the office's policies and practices. Thus, a racial pattern of prosecutions may well create a "colorable showing" that the office is engaged in discriminatory selective prosecution.

The most appropriate analogue here is not McCleskey but Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, as here, the Court addressed a claim that prosecutors were using their discretion in a racially discriminatory manner. Yet the Court in Batson did not require "exceptionally clear proof" of discrimination. On the contrary, Batson directs that courts may adopt an inference of discrimination from a prosecutor's racial pattern of strikes. 476 U.S. at 97. Such a showing does not merely justify discovery, but shifts the burden to the prosecutor to offer a race-neutral explanation for the strikes. Thus, if a defendant showed that a prosecutor used 24 of his 24 peremptory strikes to strike black jurors, the prosecutor would be required to offer race-neutral explanations for his actions, and if she was unable to do so, the court would invalidate the strikes.[33]

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[33] If the prosecutor responded with an affirmative showing that all of the potential jurors were black, defendants' showing would not establish discrimination, but in the absence of such a showing, the racial pattern would suffice to shift the burden to the prosecution. Similarly, here, the court of appeals held that if the prosecution could show that all crack offenders are black, defendants' evidence would not support a "colorable showing." But the United States has not made such a showing.

Because Batson involves the review of prosecutorial discretion in a setting where racial discrimination has been alleged, it is a far more appropriate analogue than McCleskey.[34] And if a racial pattern of strikes can create a prima facie case of discrimination in Batson, surely a racial pattern of prosecutions ought to support the less onerous threshold for the limited discovery ordered here.

IV. UPHOLDING THE DISCOVERY ORDER HERE WILL NOT OPEN THE FLOODGATES TO SELECTIVE PROSECUTION CLAIMS

In its petition, the United States intimated that allowing the Ninth Circuit decision to stand would subject prosecutors and the courts to a flood of selective prosecution claims. It pointed to nationwide statistics indicating that many crimes have disproportionate sentencing patterns, and argued that if such a showing were sufficient to justify discovery, untold numbers of criminal defendants could obtain discovery on selective prosecution claims. Like the rest of the United States's argument, this argument ignores the full record in this case.

Upholding the discovery order in this case would mean only that district courts have discretion to order discovery where: (1) defendants make a showing, particularized to the district in which they were charged, that

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[34] There are no doubt differences between a selective prosecution claim and a peremptory strike challenge. Batson claims ordinarily arise in a single case, while selective prosecution claims necessarily require a comparison with other cases. But Batson claims may also be supported by evidence of prosecutorial conduct beyond the immediate case, Ex parte Branch, 526 So. 2d 609 (Ala. 1987), and may be made even where more than one prosecutor takes part in striking jurors. Bird v. Warner, 594 So. 2d 626 (Ala. 1991).

all cases closed by the Federal Public Defender's office over a one-year period involved defendants of one race; (2) defendants offer evidence that white and black persons commit the crimes for which they are charged in equal numbers; (3) defendants offer evidence that similarly situated non-black offenders are steered to state court, where sentences are lighter; and (4) the government's evidence reinforces, rather than contradicts, defendants' showing.

The evidence in this case, in other words, is a far cry from the submission of gross national statistics about convictions. United States v. Cooks, 52 F.3d 101 (5th Cir. 1995), whose approach the United States endorses, illustrates that concerns of a slippery slope are not warranted here. In that case, as here, the court applied the "colorable showing" standard that the United States concedes is appropriate as a discovery threshold. But in that case, black defendants charged with crack cocaine violations offered no evidence particularized to their district, nor any evidence about similarly situated white offenders. 52 F.3d at 105. Defendants submitted only national statistics showing that minority arrests had increased tenfold in recent years, and that the overwhelming majority of those arrested for crack possession were African-Americans. Id. The court properly considered such generalized proof insufficient to raise a colorable showing that the U.S. Attorney in Shreveport, Louisiana was engaged in selective prosecution.

There is no evidence that the "colorable showing" discovery standard employed by the court of appeals will lead to a floodgate of claims. This is the standard used by every circuit but one, yet discovery on selective prosecution claims has proven exceedingly rare. Because the Ninth Circuit simply applied this well-established standard to determine that the district court did not abuse its discretion,

there is no likelihood that its decision will lead to a rash of unjustified selective prosecution claims.

CONCLUSION

Amici, former law enforcement officials, understand the importance of prosecutorial discretion, but also understand the equal importance of assuring the public that the criminal law is enforced fairly and equitably, without discrimination based on race. Reversing the court of appeals will contribute to a sense that significant racial inequities are being ignored by the legal system, and will undermine the legitimacy of the criminal law. For all of these reasons, the court of appeals' decision should be affirmed.

Respectfully submitted,

Jules Lobel
University of
Pittsburg Law School
3900 Forbes Avenue
Pittsburg, PA 15260

*David Cole
Georgetown Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20009
(202) 662-9078

Attorneys for the Amici Curiae

*Counsel of Record

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